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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 FRIENDS OF THE EAST FORK,
11 INC., et al,

12 Plaintiffs,

13 v.

14 BARRY THOM, et al.,

15 Defendants,

16 and

17 J.L. STOREDAHL & SONS, INC.,

18 Defendant-Intervenor.
19
20
21
22

CASE NO. C05-0189JLR

ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT
AND MOTION TO
SUPPLEMENT RECORD

I. INTRODUCTION

In these motions, the court is called upon to review decisions by the National Marine Fisheries Service and the United States Fish and Wildlife Service (“the Services”) granting J.L. Storedahl & Sons, Inc. (“Storedahl”) the right to take endangered and potentially endangered species from the East Fork Lewis River (“East Fork”) as part of its expanded gravel mining activities. Storedahl has been mining and processing gravel in the area for over 20 years. After completing its earlier mining activities, Storedahl failed to comply with state requirements for reclaiming the affected mining areas. Storedahl now promises to meet its preexisting reclamation obligations as part of the commitments it makes to the Services in order to be granted the right to expand its mining operations and potentially take endangered species from the East Fork. The question before this court is whether the Services were required to consider Storedahl’s state reclamation obligations as part of their environmental baseline analysis or whether the state obligations were too hypothetical to be included in the baseline. As discussed below, the court is persuaded that Storedahl’s preexisting obligations to reclaim land affected by its prior gravel mining is a factor that should have been considered by the Services before issuing take rights to Storedahl. The Services’ failure to consider an important aspect of the problem before it is a violation of the Administrative Procedure Act. The court therefore remands the matter to the Services to determine the proper environmental baseline applicable to the determination of whether to issue Incidental Take Permits to Storedahl.

1 Currently before the court are Plaintiffs Friends of the East Fork, Inc. and Fish
2 First's ("East Fork Friends") motion for summary judgment (Dkt. # 51); the Federal
3 Defendants'¹ cross-motion for summary judgment (Dkt. # 57); Defendant-Intervenor
4 Storedahl's motion for summary judgment (Dkt. # 58); and Storedahl's motion to
5 supplement the administrative record or, in the alternative, motion for judicial notice
6 (Dkt. # 67). Having reviewed the motions, the papers filed in support and opposition, the
7 administrative record, and having heard the argument of counsel for all parties, the court:
8 GRANTS East Fork Friends' motion for summary judgment (Dkt. # 51); DENIES the
9 Federal Defendants' cross-motion for summary judgment (Dkt. # 57); DENIES
10 Storedahl's motion for summary judgment (Dkt. # 58); and DENIES as MOOT
11 Storedahl's motion to supplement the administrative record (Dkt. # 67). The court finds
12 that the Services acted arbitrarily and capriciously in failing to consider Storedahl's
13 preexisting reclamation obligations as part of their environmental baseline analysis.
14 Accordingly, the court sets aside the Services' biological opinions for failing to apply the
15 proper environmental baseline and therefore not acting in accordance with law.

19
20 ¹ The Federal Defendants are: National Oceanic and Atmospheric Administration
21 National Marine Fisheries Service Northwest Region; its Acting Regional Administrator, Barry
22 Thom, United States Fish and Wildlife Service, Pacific Region; and its Regional Director, Robyn
Thorson. Mr. Thom and Ms. Thorson were substituted as parties pursuant to Rule 25(d)(1) of
the Federal Rules of Civil Procedure.

1 **A. Factual Background**

2 Plaintiffs Friends of the East Fork and Fish First² brought this action in January
3 2005, seeking to reverse the grant of two incidental take permits (“ITPs”)³ issued to
4 Storedahl. (Compl. (Dkt. # 1) ¶ 1.) The ITPs allow Storedahl to conduct gravel mining
5 next to the East Fork despite its impact on endangered species of fish and wildlife. The
6 East Fork runs through Storedahl’s Daybreak Mine site – the area where it proposes to
7 conduct additional gravel mining activities. The Daybreak Mine site is located on the
8 north bank of the East Fork approximately 3.5 miles from La Center, Washington and
9 approximately 4.5 miles northwest of Battle Ground, Washington. (*Id.* at ¶ 10.)

10 East Fork Friends alleges that the ITPs were issued in violation of the Endangered
11 Species Act (“ESA”), 16 U.S.C. §§ 1531-1599, the National Environmental Policy Act
12 (“NEPA”), 42 U.S.C. §§ 4321-4370f, and the Administrative Procedure Act (“APA”), 5
13 U.S.C. §§ 551-706. (*Id.*) It filed suit against the agencies responsible for investigating,
14 approving, and issuing Storedahl’s two ITPs: the National Marine Fisheries Service

15
16 ² Friends of the East Fork was incorporated in 1993 as a nonprofit organization in Clark
17 County dedicated to the conservation of the East Fork. (Compl. ¶ 3.) “Its primary goals are to
18 help restore the East Fork’s steelhead and salmon runs to near historic levels and to help restore
19 the quality of recreational experiences on the East Fork.” (*Id.*) Fish First is also a nonprofit
organization in Clark County created in 1995. (*Id.*) Fish First has a similar goal as Friends of
the East Fork to restore and enhance fish habitat and healthy fish runs in the Lewis River,
including the East Fork. (*Id.*)

20 ³ An ITP allows landowners, faced with having otherwise lawful activities prohibited by
21 the Endangered Species Act (“ESA”), to “take” an endangered species if “such taking is
22 incidental to, and not the purpose of the carrying out of an otherwise lawful activity.” 16 U.S.C.
§ 1539(a)(1)(B) (“ESA Section 10(a)(1)(B)”). Congress intended the Section 10 permits or ITPs
to encourage a “unique partnership” between public and private sectors, and serve the dual
purposes of conserving species while providing desirable “long term assurances” to participating
landowners. *Reprinted in* 1982 U.S.C.C.A.N. 2830-31 (1982 WL 25084) (Leg. Hist.).

1 (“NMFS”), which is part of the National Oceanic and Atmospheric Administration
2 (“NOAA”), and the United States Fish and Wildlife Service (“FWS”) (also referred to as
3 “the Services”). (Compl. ¶ 5.) East Fork Friends originally brought six claims against
4 the Services but only argued three of the claims in its motion for summary judgment all
5 of which relate to its broad contentions that the Services’ biological opinions unlawfully
6 fail to meet the requirements of ESA and that the Final Environmental Impact Statement
7 (“EIS”) fails to meet basic NEPA requirements. (East Fork Friends’ Mot. (Dkt. # 51) at
8 9.) According to East Fork Friends, the Services’ failures are evidenced by their (1)
9 treating the unreclaimed conditions at the Daybreak Mine as the “baseline” condition of
10 the environment; (2) failing to consider an adequate range of alternatives before issuing
11 the permits; and (3) inadequately analyzing the cumulative effects the gravel mining
12 would have on the environment. (*See generally* East Fork Friends’ Mot.)

13 Storedahl began mining and processing gravel at the Daybreak Mine in 1987,
14 intermittently mining gravel there until approximately 1995. (Compl. ¶ 11.) Storedahl
15 ceased its mining operations in 1995 but continued to process gravel on the site until
16 2001. (*Id.* at ¶ 11.) Upon completion of its mining activities, Storedahl performed some
17 reclamation of the disrupted mine site but did not complete reclamation consistent with
18 state law within the time allotted by state statute. In Washington, surface mining
19 reclamation is governed by the state Surface Mining Act (“SMA”), Chapter 78.44 RCW.
20 All surface mining in Washington requires a reclamation permit and plan. RCW
21 78.44.081, 0.91. Among other duties, the state Department of Natural Resources
22 (“DNR”) is charged with the administration and enforcement of the SMA. Thus, the

1 DNR is responsible for issuing, suspending and revoking surface mining permits and
2 enforcing the terms of the reclamation plan. RCW 78.44.040, .050, .151, .190, .210.
3 Revised Code of Washington 78.44.111 requires that a “permit holder shall reclaim each
4 segment of the mine within two years of completion of surface mining on that segment.”
5 There is no dispute that Storedahl did not complete reclamation of the property within
6 two years of closing its operations. (*See, e.g.*, December 9, 2009 Transcript at 32.)

7 Beginning in 1997, Storedahl and the Services began working together to develop
8 a Habitat Conservation Plan (“HCP”) for Storedahl’s land that would allow Storedahl to
9 resume mining on a portion of the property farther from the East Fork than its original
10 gravel mine. Storedahl’s resumption of gravel mining on an additional one hundred plus
11 acres of land next to the East Fork may have an incidental effect on a number of
12 protected species that live in the East Fork and therefore its work required that it provide
13 an HCP to the Services. Storedahl’s HCP covered four affected species that are
14 considered “threatened” under the ESA – bull trout; Lower Columbia River steelhead
15 trout; Columbia River chum salmon; and Lower Columbia River chinook salmon – and
16 five affected species that are identified as “candidate species” or “species of concern”
17 under the ESA – Oregon spotted frog; Lower Columbia River/Southwest Washington
18 coho salmon; coast cutthroat trout; Pacific lamprey; and river lamprey. The two ITPs
19 issued to Storedahl would authorize incidental takes of these nine effected species.
20 (Admin. Rec. (Dkt. # 19) at AR01494.) The applications for the ITPs were supported by
21 Storedahls’ HCP. (*Id.*) The Services decision to approve an HCP is governed by section
22 7 of ESA, and thus requires them to produce a biological opinion before issuing an ITP.

1 16 U.S.C. § 1536(a)(2). Because approving the HCP and issuing the ITPs have the
2 potential to affect the environment, the agencies' actions are subject to review under
3 NEPA, which requires the Services to prepare NEPA review documents, *i.e.*, the
4 Environmental Impact Statement or EIS.⁴

5 The expected time frame for Storedahl's expanded mining project is between 10-
6 15 years but reclamation work is to be ongoing throughout the life of the project.
7 (Admin. Rec. at AR01550.) The EIS contemplates that Storedahl will complete
8 reclamation work within six months of completing mining activity for each phase. (*Id.* at
9 AR01558.) The purpose of creating the HCP is to implement "conservation measures
10 designed to protect and enhance habitat of the species identified and to implement
11 Storedahl's proposed mining expansion and habitat enhancement activities within the
12 HCP area. In short, the HCP would provide a formal mechanism for extensive ecological
13 habitat enhancement and the conservation of listed species or species of concern." (*Id.* at
14 AR00072.) Storedahl therefore committed to performing the conservation measures
15 outlined in the HCP in exchange for permission to conduct surface mining of sand and
16 aggregate at the Daybreak Mine within a proposed 178-acre area of the 300-acre site.
17 (*Id.* at AR01547.) The area subject to mining and thus requiring reclamation would
18 consist of approximately 101 acres of the affected 178-acre area discussed in the EIS.
19 (*Id.*)

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22 ⁴ Pursuant to NEPA, federal agencies must prepare an environmental impact statement
for "major Federal action [] significantly affecting the environment." 42 U.S.C. § 4332(2)(c).

1 **B. Procedural Background**

2 This case was stayed pending Storedahl's Washington Land Use Petition Act
3 ("LUPA") appeal from the Clark County Board of County Commissioners' decisions
4 reversing the hearing examiner's grant of a rezoning permit to Storedahl, which allows it
5 to conduct additional mining on the property. (*See* September 19, 2005 Order (Dkt. # 36)
6 at 2.) On September 20, 2005, the court removed this case from its active caseload but
7 required the parties to file a joint status report every 6 months. (September 20, 2005
8 Order Removing Case from Active Caseload (Dkt. # 37).) The final status report alerted
9 the court to the Washington Court of Appeals decision denying all LUPA appeals and
10 affirming the Clark County hearing examiner's land use decision granting Storedahl a
11 permit to conduct additional mining on the property. (*See generally Storedahl v. Clark*
12 *County*, 180 P.3d 848 (Wash. Ct. App. 2008); Fourth Joint Status Report, September 27,
13 2007 (Dkt. # 42).) The parties requested that this court reopen East Fork Friends'
14 administrative appeal.

15 **II. ANALYSIS**

16 **A. Standard of Review**

17 Summary judgment is appropriate where there are no genuine issues of material
18 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
19 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary
20 judgment is particularly applicable to cases involving judicial review of final agency
21 action. *See Occidental Eng' Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). East Fork
22 Friends attacks as arbitrary and capricious both the Services' biological opinions and the

1 issuance of the Final Environmental Impact Statement. Challenges to biological opinions
2 issued pursuant to ESA Section 7, 16 U.S.C. § 1536, are reviewed under the APA to
3 determine whether the opinion was “arbitrary, capricious, an abuse of discretion, or
4 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see Bennett v. Spear*, 520
5 U.S. 154, 174 (1997); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*,
6 143 F.3d 515, 522 (9th Cir. 1998). The court also reviews an agency’s EIS pursuant to
7 NEPA under the APA. 42 U.S.C. § 4332(2)(c).

8 In determining whether an agency decision was arbitrary or capricious, the
9 reviewing court “must consider whether the decision was based on a consideration of the
10 relevant factors and whether there has been a clear error of judgment.” *Marsh v. Oregon*
11 *Nat’l Res. Council*, 490 U.S. 360, 378 (1989). “Normally, an agency rule would be
12 arbitrary and capricious if the agency has relied on factors which Congress has not
13 intended it to consider, entirely failed to consider an important aspect of the problem,
14 offered an explanation for its decision that runs counter to the evidence before the
15 agency, or is so implausible that it could not be ascribed to a difference in view or the
16 product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*
17 *Co.*, 463 U.S. 29, 43 (1983). An agency action is also arbitrary when it fails “to articulate
18 a satisfactory explanation for its action.” *Northern Spotted Owl v. Hodel*, 716 F. Supp.
19 479, 482 (W.D. Wash. 1988).

20 In applying the arbitrary and capricious standard, the focal point for judicial
21 review should be the administrative record already in existence. *Camp v. Pitts*, 411 U.S.
22 138, 142 (1973); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703 (9th

1 Cir. 1996). “Deference to an agency’s technical expertise and experience is particularly
2 warranted with respect to questions involving engineering and scientific matters.” *United*
3 *States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989); *see also*
4 *Northern Spotted Owl*, 716 F. Supp. at 482 (“Judicial deference to agency expertise is
5 proper, but the Court will not do so blindly.”).

6 **B. Environmental Baseline**

7 East Fork Friends argues that the biological opinions violate ESA because they
8 ignore Storedahl’s preexisting obligation under state law to reclaim the five existing
9 mining pits on the Daybreak Mine site. (East Fork Friends Reply (Dkt. # 60) at 1.) That
10 is, the Services improperly offset the adverse effects of digging new pits with the benefits
11 that Storedahl promises to provide by reclaiming the existing pits – restoration that
12 should have been completed more than 10 years ago.⁵ (*Id.* at 2.) East Fork Friends relies
13 on RCW § 78.44.111’s provision that the mining permit holder *shall* reclaim “each
14 segment of the mine within two years of completion of surface mining on that segment”
15 for support of its argument that the Services should have included Storedahl’s state
16 obligations in its starting baseline for determining the environmental effect of the
17 additional mining.

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20 ⁵ Reclamation under one previously approved state reclamation plan would include the
21 creation of emergent wetlands and reforestation plantings, which would be limited to those areas
22 surrounding the pits. (Admin Rec. at AR01682 (EIS at 122).) The five existing pits would be
similarly reclaimed, and the processing area would have the hard surface removed, a planting
medium placed over it, and be revegetated with valley forest species. (*Id.*) While some of this
work has begun, Storedahl acknowledges that it has not completed its reclamation work.

1 In preparing a biological opinion on a proposed action, the Services were required
2 to “evaluate the effects of the action.” 50 C.F.R. § 402.14. The term “effects of the
3 action” is defined in the ESA’s implementing regulations as:

4 Effects of the action refers to the direct and indirect effects of an action on
5 the species or critical habitat, together with the effects of other activities
6 that are interrelated or interdependent with that action, that will be added to
7 the environmental baseline. The environmental baseline includes the past
8 and present impacts of all Federal, State, or private actions and other human
9 activities in the action area, the anticipated impacts of all proposed Federal
10 projects in the action area that have already undergone formal or early
11 section 7 consultation, and the impact of State or private actions which are
12 contemporaneous with the consultation in process. Indirect effects are
13 those that are caused by the proposed action and are later in time, but still
14 are reasonably certain to occur. Interrelated actions are those that are part
15 of a larger action and depend on the larger action for their justification.
16 Interdependent actions are those that have no independent utility apart from
17 the action under consideration.

18 50 C.F.R. § 402.02. The ESA Section 7 Consultation Handbook adds:

19 The baseline includes State, tribal, local, and private actions already
20 affecting the species or that will occur contemporaneously with the
21 consultation in progress. Unrelated Federal actions affecting the same
22 species or critical habitat that have completed formal or informal
consultation are also part of the environmental baseline, as are Federal and
other actions within the action area that may benefit listed species or critical
habitat.

Final ESA Section 7 Consultation Handbook, March 1998 at 4-22. The question before
the court is whether it was proper for the Services to consider the current state of the land
without taking into account the fact that Storedahl created the degraded conditions and
was obligated to reclaim them.

Storedahl first contends that the Washington DNR “ordered” it not to comply with
its state reclamation requirements until the finalization of the HCP. (Storedahl’s Mot. at

1 9 (*see also* Admin Rec. at AR13172).) Storedahl supports this assertion with a citation to
2 a December 22, 2003 letter from Doug Sutherland, Commissioner of Public Lands for the
3 DNR, addressed to Steven W. Landino, of NMFS, detailing Storedahl’s compliance
4 history at the Daybreak Mine. (Admin. Rec. at AR13172 (12/22/03 Letter) at 1.) The
5 letter explains that on March 27, 2001, the DNR ordered Storedahl to rectify deficiencies
6 in its reclamation plan demonstrating “how the existing sediment ponds will be
7 reclaimed.” (*Id.*) The letter goes on to explain that in April 2001, the DNR stayed
8 further action on its March order until a final decision is made on Storedahl’s proposed
9 HCP. The purpose of the stay was to “incorporate any relevant elements of the [HCP], if
10 approved, into the revised reclamation plan.” (*Id.*) Mr. Sutherland concludes by noting
11 that the HCP and concurrent Surface Mine Reclamation Permit “must clearly outline
12 contingency measures.” (*Id.* at 2.) After reviewing the letter, the court cannot agree with
13 Storedahl’s characterization of the letter as an “order” to stop reclamation work. Instead,
14 the court interprets the letter as a proposal by DNR to include, and likely benefit from,
15 the research Storedahl would conduct in preparing its HCP in order to improve the work
16 required in the state reclamation plan.

17 Storedahl next argues that for the state reclamation work to be considered part of
18 the environmental baseline it must be “certain to occur.” (Storedahl’s Mot. at 11 (citing
19 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 926-30 (9th Cir.
20 2008).) The court questions the propriety of Storedahl’s argument that the state
21 reclamation work that it is required to perform under state law is uncertain to occur. As
22 this court views the argument, the only uncertainty is whether Storedahl actually intends

1 to perform its state obligations – a matter fully within Storedahl’s control. While the
2 court agrees with Storedahl that hypothetical benefits from future state-required revisions
3 to Storedahl’s reclamation plan may not be considered part of the environmental baseline,
4 the court finds that Storedahl’s overall obligation to reclaim the land is far from
5 speculative. *See* RCW § 78.44.111 (“The permit holder shall reclaim each segment of
6 the mine within two years of completion of surface mining on that segment”) The
7 only exception to this reclamation requirement is if the DNR provides a written
8 “segmental reclamation agreement” to Storedahl. *Id.* No such reclamation agreement
9 has been identified by the parties. Instead, the record supports a conclusion that the DNR
10 directed Storedahl to suspend implementation of the reclamation plan pending the final
11 decision on the HCP so that the conservation measures from the HCP could be
12 incorporated into a revised reclamation plan.⁶ (Admin. Rec. at AR13172.) While it is
13 apparent that the DNR was attempting to bolster its reclamation requirements with the
14 conservation measures outlined in Storedahl’s HCP, there can be no question that state
15 reclamation was legally required of Storedahl.⁷

16 The Services take a similar position by arguing that Storedahl’s state reclamation
17 obligations are too hypothetical to be included in the environmental baseline. The

18
19 ⁶ The record also reflects that any revised reclamation plan provided by Storedahl could
20 not be granted until its past due annual fees were paid. (Admin. Rec. at AR13172 (12/22/03
DNR letter to Storedahl explaining that overdue notices have been sent once per month to
Storedahl for the past 697 days).)

21 ⁷ The DNR wrote Storedahl in November 2000, five years after Storedahl had closed its
22 mining operations stating that “[t]here is no dispute that this site is in need of reclamation.”
(Admin. Rec. at AR05701.)

1 Services rely on the Ninth Circuit’s unpublished decision in *Swan View Coal. v.*
2 *Barbouletos*, No. 08-35685, 2009 WL 3287715 (9th Cir. October 13, 2009). (Services’
3 Notice of Supp’l Auth. (Dkt. # 63) at 2). The Honorable Donald W. Molloy, District
4 Judge for the District of Montana, presided over the *Swan View* case at the district court
5 level and his opinion illustrates the fine distinction between what lies in the hypothetical
6 and what may be considered real for purposes of determining the environmental baseline.
7 Judge Molloy’s opinion in *Swan View* is therefore instructive in the case before this court
8 and thus requires an explanation of its dual holdings.

9 In *Swan View*, Judge Molloy addressed the protection of the grizzly bear, a
10 threatened species under the ESA, in light of the use of winter motorized vehicles in the
11 Flathead National Forest. *Swan View Coal. v. Barbouletos*, CV06-73-M-DWM, 2008
12 WL 5682094 (D. Mont. June 13, 2008). The plaintiffs in *Swan View* brought an action
13 against the United States Forest Service (“Forest Service”) and the FWS seeking judicial
14 review under the APA of two biological opinions issued by the Forest Service. One
15 biological opinion addressed a revised schedule to Amendment 19 of the Flathead
16 National Forest Plan (“Amendment 19”) and the second biological opinion addressed
17 Amendment 24 to the same plan relating to snowmobiling (“Amendment 24”).

18 Amendment 19 essentially established new forest-wide standards requiring that
19 there be no net increase in the total motorized activity in the National Forest lands. *Id.* at
20 *3. The *Snow View* plaintiffs argued that the biological opinion for Amendment 19 failed
21 to consider improvements and goals that the Forest Service was supposed to have
22 achieved under the Forest Plan as part of its environmental baseline. *Id.* Judge Molloy

1 disagreed, holding that “there is no legal support for the plaintiffs’ position,” because the
2 language of 50 C.F.R. § 402.02 requires that in setting the environmental baseline the
3 Forest Service must take into account the future impacts of “approved federal actions and
4 proposed federal projects that have already undergone formal consultation.” *Id.* at *12.
5 Judge Molloy determined that the Forest Plan is not an action or a project but rather a
6 “programmatic document that does not obligate the Forest Service to undertake specific
7 projects.” *Id.* The court focused on the absence of “a single statute, case, or regulation
8 directing the [FWS] to consider programmatic planning documents in setting the
9 environmental baseline.” *Id.* (citations omitted). “Goals,” according to Judge Molloy, do
10 not create binding obligations in all future biological opinions and thus are not considered
11 as part of the environmental baseline. *Id.*

12 In contrast, Judge Molloy held that the biological opinion supporting Amendment
13 24 relied on a faulty environmental baseline because it failed to consider the Forest
14 Service’s refusal to enforce its own rules. *Id.* at *15. Amendment 24 addressed the
15 amount of land the Forest Service would open up to allow spring snowmobiling. In
16 analyzing the environmental baseline, the FWS used the existing snowmobiling use in the
17 National Forest. The plaintiffs, however, took issue with this baseline because under the
18 Forest Plan in effect prior to Amendment 24 there was to be no snowmobiling allowed
19 after the denning season for grizzly bears. Yet, because the Forest Service failed to
20 enforce the prohibition on spring snowmobiling, the *existing* conditions reflected that
21 spring snowmobiling was occurring throughout the National Forest. *Id.* at *13. The
22 FWS’s use of “existing degraded habitat conditions brought on by the Forest Service’s

1 refusal to enforce its own rules [wa]s contrary to law.” *Id.* at *16. Judge Molloy
2 determined that the Forest Service’s failure to include its obligation to enforce the no
3 snowmobiling policy as part of the environmental baseline violated the ESA. *Id.*

4 Both sides appealed Judge Molloy’s decision. The government, however,
5 withdrew its appeal on Amendment 24 before briefing in the Ninth Circuit had
6 commenced. (Services Supp’l at 2.) The Ninth Circuit therefore only considered Judge
7 Molloy’s decision as to Amendment 19 and affirmed the holding, finding that “FWS
8 properly used *actual* habitat conditions as allowed by *Nat’l Wildlife*.” *Swan View*, 2009
9 WL 3287715, *1 (citing *Nat’l Wildlife*, 524 F.3d at 926-30). The Ninth Circuit did not
10 have occasion to comment on Judge Molloy’s decision with respect to Amendment 24
11 and whether the environmental baseline should include degraded conditions created by
12 the agency’s failure to enforce its own rules.

13 This court is satisfied that the same incongruity and inequity described in Judge
14 Molloy’s analysis of Amendment 24 applies here. Storedahl, as the permit holder, was
15 originally granted permission to mine gravel on approximately 70 acres next to the East
16 Fork, so long as it conducted reclamation activities with two years of completing its
17 mining activity. Storedahl failed to complete the reclamation within the time-frame set
18 by state law. The East Fork thereafter avulsed into the gravel pits created in part from
19 gravel mining in the area and damaging habitat for protected species of fish. Storedahl
20 now seeks an ITP that would permit it to “take” additional protected species of fish with
21 the promise of conservation measures that include its original state reclamation
22 obligations. Storedahl’s delay in completing its state reclamation activities does not

1 provide adequate support for the notion that it should be permitted to conduct additional
2 gravel-pit mining based on its promise to perform reclamation work it was already
3 obligated to perform.

4 The questions raised by the parties of whether the reclamation activities of other
5 permit holders may be considered as part of the environmental baseline or whether an
6 environmental baseline should act as a “ledger for tracking compliance with state legal
7 obligations,” are valid questions but are not present in this case. Here, the actor
8 requesting to expand its take of protected species is the same one that has yet to finalize
9 its reclamation of its own prior gravel mining. Thus, the “degraded habitat conditions”
10 present in this case – conditions for which Storedahl would receive credit for reclaiming
11 – is the same degraded habitat created by Storedahl.

12 The court therefore finds that Storedahl’s original reclamation requirements are
13 not “hypothetical” but rather legal requirements binding Storedahl to reclaim the property
14 subject to its original permit. The reclamation work is only “hypothetical” if Storedahl
15 has no intent of performing its state reclamation obligations. The court disagrees that
16 *National Wildlife* dictates a different result. In *National Wildlife*, the Ninth Circuit held
17 that the NMFS violated ESA by its use of hypothetical “reference operations,” in its
18 jeopardy analysis. 524 F.3d at 927-28. The “reference operations” at issue were broad
19 congressional mandates and “goals” that NMFS improperly included in its baseline
20 analysis. Here, the state reclamation requirements do not sound in broad mandates or
21 goals. The regulations applicable to Storedahl’s unfinished reclamation work provide
22

1 that it “shall reclaim” the gravel mine within two years of completing its operations.

2 RCW § 78.44.111.

3 Storedahl created the degraded baseline conditions present at the Daybreak Mine
4 by failing to reclaim gravel pits pursuant to state law. Nevertheless, Storedahl seeks to
5 benefit from its culpability in the degradation of the conditions by using the work it
6 should have done as an incentive for the Services to issue ITPs permitting it potentially to
7 take more protected species as part of its expanded gravel mining operations. While the
8 court is not in a position to determine what, if any, impact an adjusted environmental
9 baseline will have on the Services’ decision to issue Storedahl the requested ITPs, the
10 court is satisfied that, at a minimum, the Services should consider the state of the land as
11 it should have been if Storedahl had met its state reclamation obligations, in establishing
12 the baseline for its analysis.

13 **C. Motion to Supplement**

14 After the hearing on the cross-motions for summary judgment, Storedahl moved to
15 supplement the record with, or for the court to take judicial notice of, documents that
16 show: (1) Storedahl submitted annual reclamation reports to the DNR; (2) Storedahl
17 performed substantial reclamation of the ponds pursuant to a valid SMA permit and
18 DNR-approved reclamation plan; and (3) that by 1997, Storedahl was developing a
19 comprehensive revised reclamation plan covering the entire property. (Storedahl’s Mot.
20 (Dkt. # 67) at 2.)

21 Even if Storedahl’s motion met the standard for considering extra-record evidence,
22 which the court is not convinced it does, the question before the court is not whether

1 Storedahl conducted sufficient reclamation work to satisfy its state obligations. The
2 question is whether the Services should have considered Storedahl's state obligations in
3 determining the environmental baseline for its analysis. Neither Storedahl nor the
4 Services disputes the fact that the Services did not consider Storedahl's preexisting
5 obligations when determining the proper baseline. The court therefore leaves the
6 determination of the net effect of Storedahl's past and future reclamation obligations to
7 the Services in charge of reevaluating whether to issue ITPs to Storedahl. The court
8 presumes that the information provided by Storedahl regarding its past reclamation work
9 will be valuable to this determination. This information is not, however, relevant to the
10 court's finding that the Services should have considered Storedahl's state obligations
11 regarding reclamation as part of its environmental baseline and the court therefore denies
12 the motion to supplement as moot.

13 **D. Range of Alternatives**

14 East Fork Friends also contends that the EIS fails to satisfy NEPA requirements
15 because the Services offered no alternatives that would be more protective of the listed
16 species than the proposed HCP. (East Fork Friends' Reply at 7.) The Services have a
17 duty to "[s]tudy, develop, and describe appropriate alternatives to recommended courses
18 of action," 42 U.S.C. § 4332(E); to "[u]se the NEPA process to identify and assess the
19 reasonable alternatives to proposed actions that will avoid or minimize adverse effects of
20 these actions upon the quality of the human environment," 40 C.F.R. § 1500.2(e); and to
21 "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §
22 1502.14(a). In carrying out this duty, the Services are evaluated using the "rule of

1 reason.” *See Nw Env’tl Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th
2 Cir. 1997) (“We review an agency’s range of alternatives under a ‘rule of reason’
3 standard that ‘requires an agency to set forth only those alternatives necessary to permit a
4 reasoned choice.’”) (citation omitted). The rule of reason requires an agency to set forth
5 only those alternatives necessary to permit a “reasonable choice.” *California v. Block*,
6 690 F.2d 753, 767 (9th Cir. 1982) (quoting *Save Lake Washington v. Frank*, 641 F.2d
7 1330, 1334 (9th Cir. 1981)).

8 The Services initially considered six alternatives, three “no action” alternatives,
9 and three “action” alternatives. Two of these six (one in the no action category and one
10 in the action category) were eliminated from detailed analysis because they did not meet
11 project objectives. The four remaining project alternatives (two “no action” and two
12 “action” alternatives) were subjected to “detailed study” in accordance with NEPA. 40
13 C.F.R. § 1502.14(a). In the first “no action” alternative, Storedahl proposed that the site
14 would be divided into fourteen 20-acre residential or agricultural tracts, and processing of
15 imported gravel would continue. No conservation measures would be implemented and
16 no ITP would be required, hence the “no action” designation. (Admin. Rec. at AR 1535-
17 38.) The Services determined that residential and agricultural development would
18 produce its own set of environmental impacts and would not afford long-term habitat
19 stewardship. (*See, e.g.*, Admin. Rec. at AR01537-38.) Under the second “no action”
20 alternative, Storedahl would mine about 178 acres, but would not seek ITPs, and would
21 reclaim the existing pits in accordance with state law, under which no off-site habitat
22

1 improvement would be required. (Admin. Rec. at AR01538-45.) This alternative was
2 rejected as it afforded no habitat improvement.

3 As for the two “action alternatives,” the preferred alternative and most
4 environmentally protective would involve mining on 101 acres and would require ITPs
5 and a commitment by Storedahl to complete the work promised in the HCP. (Admin.
6 Rec. at AR01545-65.) The second action alternative is similar to the first but provides
7 fewer conservation measures and allows mining on slightly more acreage (105 acres).
8 (Admin. Rec. at AR01565-73.) Thus, the Services reasonably concluded that a less
9 expensive, less protective alternative to the preferred action was a reasonable way to
10 “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the
11 decisionmaker and the public.” 40 C.F.R. § 1502.14 (explaining the goal of alternatives
12 analysis). The Services’ decision as to how best to define the issues is reasonable. They
13 reasonably decided to compare a highly protective “action” alternative and a modestly
14 protective one with two “no action” alternatives that are economically plausible but have
15 greater environmental effects. The court finds that the Services did not act arbitrarily and
16 capriciously in deciding to accept Storedahl’s first action alternative. The court notes,
17 however, that based on its finding that the threshold determination of the environmental
18 baseline was fundamentally flawed, it is uncertain whether the alternatives presented by
19 Storedahl on remand will be the same as those discussed herein.

20 **E. Cumulative Effects**

21 East Fork Friends questions the Services’ cumulative effects analysis because (1)
22 the Services looked only at the impact during the term of the HCP without considering

1 the consequences of the HCP after it has expired; and (2) the Services identified the risk
2 of avulsion into the existing Daybreak Mine pits as the greatest “adverse cumulative
3 impact” on the species in the area but failed to address the fact that Storedahl was
4 obligated under state law to reclaim these pits. (East Forks Friends Reply at 9.)
5 Cumulative effects are defined as “those effects of future State or private activities, not
6 involving Federal activities, that are reasonably certain to occur within the action area of
7 the Federal action subject to consultation.” 50 C.F.R. § 402.02.

8 East Fork Friends does not offer any support for the proposition that the Services
9 did not consider the consequences once the HCP had expired, nor does it provide legal
10 authority stating that the failure to consider future events supports a finding that the
11 Services acted arbitrarily and capriciously. As for the second argument, this is simply a
12 restatement of the argument that the Services used the wrong environmental baseline,
13 which is discussed above. Accordingly, the cumulative effects analysis is dependent on
14 the Services’ determination of the environmental baseline and therefore must be
15 reconsidered in light of the court’s order to remand.

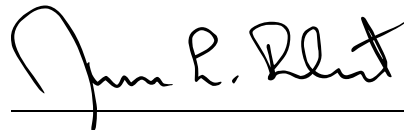
16 **III. CONCLUSION**

17 The court grants summary judgment in favor of East Fork Friends and against the
18 Defendants on claim one and claim three of the complaint. The court sets aside the
19 NMFS and FWS biological opinions for failing to comply with ESA in setting the
20 environmental baseline and consequently failing to consider an important aspect of the
21 problem. The Services’ issuance of the two ITPs was not in accordance with the APA.
22

1 The court finds that East Fork Friends has abandoned the remainder of its claims and
2 therefore it does not express an opinion on these claims.

3 The court GRANTS East Fork Friends' motion for summary judgment (Dkt. #
4 51); DENIES the Federal Defendants' cross-motion for summary judgment (Dkt. # 57);
5 DENIES Storedahl's motion for summary judgment (Dkt. # 58); and DENIES as MOOT
6 Storedahl's motion to supplement the administrative record (Dkt. # 67). The court sets
7 aside the Services' biological opinions for failure to apply the proper environmental
8 baseline to their opinions and therefore not acting in accordance with law. The court
9 remands the matter to the Services for further consideration consistent with this order.

10 Dated this 11th day of February, 2010.

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14 JAMES L. ROBART
15 United States District Judge
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